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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

UNITED STATES OF AMERICA,
Petitioner,

v.

THE GLENN L. MARTIN COMPANY,
A BODY CORPORATE,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

JOHN T. KOEHLER,
Attorney for Respondent.

The Daily Record Co. Print, Baltimore.

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IN THE

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OCTOBER TERM, 1938.

No. 854.

UNITED STATES OF AMERICA,

Petitioner,

v.

THE GLENN L. MARTIN COMPANY,

A BODY CORPORATE,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (R. 43-48) is reported in 100 F. (2d) 793. The opinion of the District Court (R. 14-19) is reported in 23 F. Supp. 262.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered January 9, 1939 (R. 48). Notice of the filing of the petition for certiorari was served on counsel for the respondent on April 10, 1939. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial

Code, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 938: 28 U. S. C. A. sec. 347).

QUESTIONS PRESENTED.

1. Under a Government supply contract providing for an increase of the purchase price to reimburse the contractor for any "* * * other taxes or charges * * * imposed or changed by the Congress subsequent to the date of this contract and made applicable directly upon production, manufacturer or sale of the supplies called for * * *" by the contract, is the contractor entitled to reimbursement for taxes subsequently imposed under Titles VIII and IX of the Social Security Act and allocated to the cost of performing this particular contract?

2. Are unemployment insurance taxes "* * * paid by the contractor * * *" to a state within the meaning of the "* * * other taxes or charges * * *" described in Question 1, such taxes being paid to a state pursuant to a law enacted after the adoption of the Social Security Act and neither increasing nor decreasing the total amount of unemployment insurance taxes (State and Federal) payable by the contractor after the Social Security Act became effective?

STATEMENT.

Most of the facts (none of which are in dispute) have been set forth in the petition (pp. 2-5). In addition, the District Court found (R. 16 and 23 F. Supp. 262, 263) that "The general purpose of the clause doubtless was to indemnify the contractor against increased cost of production due to increased taxes imposed by subsequent Acts of Congress, * * *" and the Circuit Court of Appeals stated (R. 46 and 100 F. (2d) 793, 795) that "* * * the provision was evidently inserted to protect

the contractor against loss arising from the imposition of new or additional federal taxes, which would increase his cost of production but could not be anticipated with an degree of accuracy; * * *".

REASONS FOR DENYING THE WRIT.

I.

No Important Question Is Presented.

This Court is asked to grant a writ of certiorari to review a decision of the Circuit Court of Appeals to the effect that a broad provision in a contract, the purpose of which was to indemnify the contractor against increased costs of production resulting from the imposition by Congress of new taxes which could not be anticipated when the contract was signed, included social security taxes paid by the respondent as an increased cost of labor engaged in the production of the supplies called for by the contract. The question so decided concerns only the meaning of the second sentence of Article 17 (3) of the contract under consideration as applied to a specific tax enacted after the contract was signed. As this brief points out, *infra*, p. 4, this sentence has been changed in subsequent contracts. It follows that the decision in this case is not a precedent for other or different taxes which might be imposed by Congress in the future. No important question of local, general or federal law is involved and no conflict of authority exists.

II.

The Asserted Basis For Granting Certiorari Is Too Indefinite To Be Substantial.

The petitioner asserts that the decision of the Circuit Court of Appeals is one of great importance *solely* because it is alleged that the provision is present in "Al-

most all Government contracts since 1933 * * *" and "The War Department alone, however, states that approximately 4,000 potential claims may arise * * *" (Petition pp. 8-9).

It is pertinent to observe that the second sentence of Article 17 (3) of the contract in question is applicable only to social security taxes paid under contracts signed before August 14, 1935, the date of enactment of the Social Security Act, in view of the fact that, in order to be recoverable, such taxes must have been " * * * imposed * * * by the Congress subsequent to the date of (the) contract." In addition, the second sentence of Article 17 (3) as contained in contracts subsequent to August 14, 1935, has been mo fied by Government draftsmen for the specific purpose of preventing the recovery of social security taxes paid into State unemployment compensation funds (see Appendix A). It follows that the broadest possible application of the decision of the Circuit Court of Appeals is limited to Government contracts signed between 1933 and August 14, 1935 which were not completed by January 1, 1936 and January 1, 1937, the effective dates of Titles IX and VIII respectively, of the Social Security Act (c. 531, 49 Stat. 620).

The petitioner seeks a further review of an adverse decision on the asserted ground that at least "* * * 4,000 potential claims may arise * * *". Aside from the fact that the scope of a decision is immaterial as a matter of law, it should be observed that the petitioner has failed to submit (1) an estimate of the amounts involved in these potential claims, (2) a statement of the number of suits, if any, which have been filed and which are based on such potential claims, and (3) an estimate of

the number and aggregate amount of such potential claims which will be barred by limitations during the current year (Section 24 (20) Judicial Code: 28 U. S. C. A. sec. 41 (20)).

Counsel for the Government has not contended that any other suit involving this question has been filed. Counsel for the respondent neither knows nor has been informed of any pending or prospective suit which involves the precise language of Article 17 (3) of the contract here under consideration, and knows or has been informed of but one suit involving language similar to that contained in this contract. In that case, the word "directly" does not appear. It is respectfully submitted, therefore, that this Court is asked to review a question involving nothing more than the interpretation of certain language in a Government contract which has not been shown to have far reaching significance.

III.

The Circuit Court of Appeals Decided Both Questions Correctly.

A. The District Court concluded that social security taxes were "* * * similar in nature to other burdens placed upon an employer by law for the safety or welfare of employees, such as required fire escapes on high buildings, and sanitary regulations for working conditions. All such humanitarian requirements clearly do actually increase manufacturing costs although they operate indirectly through overhead expense rather than directly, as would increased wages paid for the work done." (R. 17 and 23 F. Supp. 262, 264).

This confusion between capital expenditures and current expenses and the failure of the learned Court to distinguish between general overhead expenses and cur-

rent expenses allocable to a particular contract in course of completion led the Court to the incorrect conclusion that social security taxes on wages paid to individuals engaged in the performance of the contract were not applicable directly upon production or manufacture of the supplies called for by the contract. The Circuit Court of Appeals, without commenting upon the failure of the District Court to distinguish between capital expenditures and current expenses, approached the question from the correct point of view in the following language (R. 45, 46, and 100 F. (2d) 793, 795, 796):

> "And because the tax is one upon the relation of employment, it is argued that it cannot be a tax 'applicable directly' upon production or manufacture. We think, however, that, not this conclusion, but the contrary, is the one which logically follows. As the whole is the sum of all its parts, a tax applicable directly on one of the parts is necessarily applicable directly on the whole which comprises it. The manufacture or production of the supplies called for by the contract necessarily involves the employment of labor and the use of materials; and a tax applicable directly upon either is a tax applicable directly upon the manufacture or production itself. *No tax more directly applicable upon manufacture or production can be conceived, we think, than a payroll tax measured by wages paid to labor engaged therein.*" (Italics supplied.)
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> * * * * * *
>
> "The learned judge below was of opinion that the tax operated 'indirectly through overhead expense rather than directly, as would increased wages paid for the work done'. But a payroll tax measured by the wages paid to produce an article burdens production and increases the cost thereof to the same extent and in substantially the same way as increased wages."

Proper weight was given to the word "directly" in the following language (R. 46 and 100 F. (2d) 793, 795):

> "The taxes, it will be noted, are to be applicable directly upon the 'manufacture, production or sale' of the articles, not directly upon the articles themselves; and this requirement of directness is satisfied where the tax is imposed on some essential element of 'manufacture, production or sale' in such way as to constitute a direct burden upon same. It excludes, of course, such taxes as do not directly burden 'manufacture, production or sale', such as income, excess profits and capital stock taxes."

B. The Circuit Court of Appeals decided the second question correctly by holding that contributions made by the respondent to the unemployment fund of the State of Maryland, and for which a credit was allowed against the tax imposed by Title IX of the Social Security Act to the extent of 90% of such tax, were nevertheless taxes imposed by Congress within the meaning of the contract. The Court declared (R. 47-48 and 100 F. (2d) 793, 796-797):

> "Even though the taxpayer was under legal obligation to pay the state tax to the state, the fact remains that that tax was imposed in connection with the general system brought into being by the federal Act and payment thereof was recognized as satisfying 90% of the obligation imposed by the federal tax. See Sections 903 and 904, 42 U. S. C. A. secs. 1103, 1104; *Steward Mach. Co. v. Davis,* 301 U. S. 548, 57 S. Ct. 883, 81 L. Ed. 1279, 109 A. L. R. 1293. If the state had not imposed a tax and established an unemployment fund complying with the requirements of the federal Act, the entire amount of the federal tax, without credit, would have been collected by the federal government and plaintiff would unquestionably have been entitled to recover same under the con-

tract provision. We think it is in no worse plight because the state has seen fit to comply with the provisions of the federal Act and thus receive 90% of the tax that it imposes."

In *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 507, this Court declared:

> "By Section 902 of the Social Security Act, contributors to the state fund are entitled to credit their contributions *in satisfaction of the tax imposed on employers by the Social Security Act*, to the extent of 90% of the tax. See *Chas. C. Steward Machine Co. v. Davis*, decided this day, *post*, p. 548." (Italics supplied.)

Finally, it is to be noted that the second sentence of Article 17 (3) does not require that taxes imposed by Congress must have been paid by the contractor *to the United States* in order to be recoverable. The case of *Batavia Mills, Inc. v. United States*, 85 Ct. Cls. 447, 19 A. F. T. R. 1327, is directly in point.

CONCLUSION.

The Circuit Court of Appeals has correctly decided both questions, neither of which is of great general importance. Wherefore, it is respectfully submitted that the petition should be denied.

JOHN T. KOEHLER,
Attorney for Respondent.

April 20, 1939.

APPENDIX A.

In Orders and Regulations, Corps of Engineers, U. S. Army, Chapter VII (Contracts, Methods of Purchase and Claims), issued August 1, 1937, the following appears (pp. 57-58):

"(i) Federal, State, county, and municipal taxes. —If not contained in the standard forms of invitations for bids and contracts for the procurement of supplies, the following tax conditions will be included in all specifications for the procurement of supplies with proper reference thereto in the invitation form. Any tax conditions appearing in any of the supply forms in conflict therewith will be deleted.

Prices bid herein include any Federal tax heretofore imposed by the Congress which is applicable to the material on this bid. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress after the date set for the opening of this bid, and made applicable directly upon the production, manufacture, or sale of the supplies covered by this bid, and are paid *to the Government* by the contractor on the articles or supplies herein contracted for, then the prices named in this bid will be increased or decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items." (Italics supplied.)